IN THE

SUPREME COURT OF THE UNITED STATES

1978-79 TERM

NO. 78-829

GEORGE CLAYTON BLUE,

Petitioner

vs

STATE OF IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT
OF IOWA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

The Petitioner, George Clayton Blue, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Iowa entered in this proceeding May 31, 1978, and the denial of further review by the Supreme Court of Iowa, entered July 21, 1978.

OPINION BELOW

The opinion of the Court of Appeals of Iowa is unpublished; it appears as appendix A.

JURISDICTION

On the 31st day of May, 1978, the Iowa Court of Appeals filed its opinion and Judgment (see Appendix A). Petitioner filed a motion for a rehearing by the Supreme Court of Iowa of the matters respectfully submitted herein, which was denied on July 21, 1978 and has neither requested nor received an Order granting an extension of time within which to file a petition for certiorari. The jurisdiction of this court is invoked under Title 28 U.S.C. §1257(3).

QUESTION PRESENTED

May a closed notebook, removed from a suspect's possession for inventory purposes at the time of booking or seized and used in evidence, even though no showing of probable cause has been made?

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves:

U.S. Const. amend. IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violaged, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. XIV §1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the

State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. 1257 (3). Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

...(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Rule 402(b) Iowa Rules of Appellate Procedure. Grounds. An application to the Supreme Court for further review shall allege precisely and in what manner the Court of Appeals:

...(3) Has not considered a potentially controlling constitutional provision in rendering its opinion.

STATEMENT OF THE CASE

Petitioner was convicted in Hardin County District Court, State of Iowa, of the crimes of conspiracy, as defined by §719.1 of the 1975 Code of Iowa, to commit larceny over twenty dollars, and two counts of larceny over twenty dollars, in violation of §§709.1 and 709.2 of the 1975 Code of Iowa, all occurring on or about May 12, 1975, and was sentenced to imprisonment for concurrent terms of two, five and five years. The case was appealed, and the Iowa Court of Appeals affirmed the conviction, modifying the sentence by vacating the second five-year term. The opinion was not published, but appears in Appendix A.

The events leading to the trial and conviction of George Clayton Blue are as follows:

During April of 1975, Roger A. Downs, a Special Agent for the Iowa Bureau of Criminal Investigation, began an investigation concerning the theft of farm tractors and farm chemicals. During this investigation he met with one Roger Hertema, who disclosed that he could arrange for Downs to purchase stolen tractors and chemicals. During several conversations with Downs, Hertema referred to his numerous business contacts, and Hertema was observed in conversation with Defendant

On May 12, 1975, two stolen tractors were delivered to Special Agent Wood and Iowa Highway Patrolman Martin, who were acting in undercover capacity, while Downs and other agent conducted surveillance of the transaction. Following the delivery of these tractors, Agent

Downs contacted Hertema in Cedar Falls, Iowa to arrange payment of $20,000,00. for one tractor, the other having fallen in a ditch and therefore not been delivered. At this meeting Hertema was arrested, and he gave a statement concerning his activities and arrangements in the theft and sale of the tractors. Following this meeting, arrest, and statement, Downs and Hertema proceeded to Newton, Iowa, where Hertema said he was to meet Defendant and give him the $20,000.00 for the sale of the tractor. At this meeting, Defendant was arrested after refusing receipt of the money, and certain items were seized from him, including a notebook containing the names of some of the parties involved in the theft.

On July 8, 1975, Defendant filed a Motion to Dismiss, a Motion to Separate Counts and for Separate Trial on Count I, and a Motion in Limine to suppress prosecution references to other crimes in which Defendant might have been involved. On September 9, 1975, all Motions were overruled. On February 17, 1976, Defendant filed a Motion to Suppress evidence seized at the time of arrest, and renewed the Motion in Limine.

On February 17, 1976, the case proceeded to trial. During trial, Defendant renewed all motions which were overruled, moved for a mistrial, and entered a Motion for Directed Verdict. All of Defendant's motions were overruled. At the close of all evidence, Defendant renewed the Motion for Directed Verdict.

The Iowa Court of Appeals rejected this assigned error and affirmed the conviction. The Supreme Court of Iowa denied the petition for further review.

REASONS FOR GRANTING THE WRIT

I. IN THIS CASE THE IOWA COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION OF SUBSTANCE THAT A CLOSED NOTEBOOK REMOVED FROM A SUSPECT'S POSSESSION FOR INVENTORY PURPOSES AT THE TIME OF BOOKING MAY BE SEIZED AND USED IN EVIDENCE EVEN THOUGH NO SHOWING OF PROBABLE CAUSE HAS BEEN MADE.

II. THE IOWA SUPREME COURT HAS REFUSED FURTHER TO EXAMINE THIS IMPORTANT ISSUE.

A review of the decisions of the Supreme Court of the United States indicates that the questions presented in this petition for a Writ of Certiorari have yet to be decided.

Petitioner respectfully submits that the Iowa Court of Appeals committed reversible error in affirming the trial court's admission of the notebook into evidence, and the Iowa Supreme Court erred in refusing to review an issue involving a constitutional right.

The Court allowed introduction of State's exhibit 9, a blue Penrite notebook seized from the Defendant; and overruled Defendant's Motion to Suppress on grounds that such evidence was seized contrary to the Fourth Amendment because said search and seizure was without consent of Defendant; was without probable cause or lawful justification; and unreasonable in that the property seized was not a weapon, dangerous instrumentality, fruits of any crime, or contraband.

At trial, Richard Abin, Black Hawk County Deputy Sheriff, described the procedure and purpose of the inventorying process. At that time, the notebook and miscellaneous papers therein were seized by Agent Brosnahan, and then turned over to the custody of Agent Downs. Testimony by Agent Downs revealed the information that the notebook contained the names of various people involved in the offense as well as regular business associates of Defendants, and that one of the miscellaneous papers contained information relating to an offense which never occurred. Both the notebook and the miscellaneous paper were admitted.

No warrant had been issued for Defendant's arrest, nor for any search of Defendant's person or possessions. Warrantless searches are per se unreasonable under the Fourth Amendment, subject to only a few specifically established and well delineated exceptions. State v. King, 191 N.W.2d 650, 654 (Iowa 1971). And a search and seizure without a warrant may only be conducted where incident to a lawful arrest, by informed consent, or under exigent circumstances. State v. Jackson, 210 N.W.2d 537, 539 (Iowa 1973). Here, no consent was given, and the seizure took place some time after the arrest, Defendant having been arrested in Newton, Iowa and transported to Waterloo. During the period of transportation, Defendant was in custody of Agent Downs, who later received the evidence seized by Agent Brosnahan. No attempt was made to take any of Defendant's possessions into custody until the time of the inventory, which was admittedly a protective measure to keep track of Defendant's

possessions. Therefore, only exigent circumstances would justify a warrantless seizure of property taken for custodial purposes.

The burden of showing exigent circumstances is upon those seeking to come within that exception. State v. Shea, 218 N.W.2d 610, 613 (Iowa 1974). State v. King, 191 N.W.2d 650, 654 (Iowa 1971). Exigent circumstances sufficient to justify a search and seizure without a warrant usually include danger of violence and injury to the officers or others; risk of the subject's escape, or the probability that unless taken on the spot evidence will be taken or destroyed. State v. Jackson, 210 N.W.2d 537, 540 (Iowa 1973). It is apparent from the record that no risk of violence or escape existed; and since the Defendant was in custody there was clearly no opportunity or chance for distruction or removal of evidence.

Where the search is based upon a police officer working without a warrant and therefore without a magistrate's determination of probable cause, the evidence must be of a more persuasive character than would justify issuance of a warrant (emphasis in original). Turk v. United States, 429 F.2d 1327, 1330 (8th Cir. 1970). And probable cause must rise above mere suspicion. State v. Shea, 218 N.W.2d 610, 614 (Iowa 1974). Defendant objected to the seizure of the notebook on the grounds of lack of probable cause. At the time of Defendant's arrest, the arresting officers saw no need to conduct a search. No examination was in fact made until such time as Defendant was going through the standard in-

ventorying process pursuant to being jailed. At this time, Agent Brosnahan seized a closed notebook and the papers contained therein, with no greater justification than its mere existence. Agent Brosnahan showed no probabe cause for removing a closed, private notebook from the rest of Defendant's personal possessions.

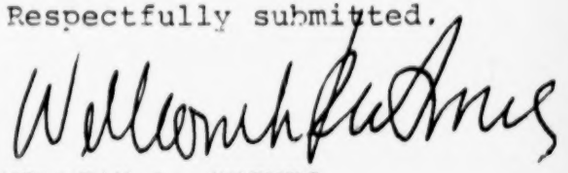
The Fourth Amendment protects privacy to the extent that it prohibits unreasonable searches and seizures of persons, houses, papers and effects. State v. Osborne, 200 N.W.2d 798, 804 (Iowa 1972). The reasonableness of search and seizure depends on the facts of each case. State v. Entsminger, 160 N.W.2d 480, 483 (Iowa 1968). Agent Brosnahan went on a fishing expedition. He had no reason to connect a notebook in a businessman's pocket with the crimes with which he was charged, nor was he justified in removing said notebook from the custody of the jail, without a showing of probable cause. Private papers in a closed book should not have been accessible without a warrant, or a strong showing of probable cause, and their admission into evidence should have been denied.

As to the Iowa Supreme Court denying further review, Rule 402(b) Iowa Rules of Appellate Procedure state that a constitutional question is grounds for further review. A substantial question existed, but the Iowa Supreme Court refused to give further consideration to this important matter.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Iowa.

Respectfully submitted,



WILLIAM L. KUTMUS

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF IOWA

STATE OF IOWA, :

Filed May 31, 1978

Appellee :

v. :

493
59552

GEORGE CLAYTON BLUE, :

Appellant. :

Appeal from Hardin District Court-Albert L. Habhab, Judge.

Appeal from convictions for conspiracy to commit larceny and larceny of property over $20 in value in viclation of §§ 719.1 and 709.2, The Code. Defendant raises evidentiary and double punishment issues. Modified and affirmed.

William L. Kutmus, Des Moines, for appellant.

Richard C. Turner, Attorney General, Faison Sessoms, Assistant Attorney General, and Jim R. Sween, Hardin County Attorney, for appellee.

Submitted to Allbee, C.J., Snell, Oxberger and Carter, JJ.; Donielson, J., takes no part.

PER CURIAM

George Clayton Blue appeals his convictions for conspiracy to commit larceny and larceny of property over $20 in value, violations of §§ 719.1, 709.2, The Code. He raises a variety of contentions which we consider in the order briefed.

I. Defendant first insists that a notebook which was taken from his person when he was incarcerated in the Black Hawk County jail in Waterloo after his arrest should have been suppressed. His complaint is based on the lack of a warrant for the seizure and on the delay which occurred between his arrest in Newton and his incarceration in Waterloo.

Warrantless searches for evidence of crime are reasonable when conducted pursuant to a valid arrest. United States v. Robinson, 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). Searches and seizures which could be made at the time of arrest may also be conducted later, when the accused arrives at the place of detention. United States v. Edwards, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974), citing Abel v. United States, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960); see State v. Salazar, 213 N.W.2d 490, 492 (Iowa 1973). Thus, the defense having stipulated that the arrest was valid, seizure of the notebook was within the search incident to arrest exception to the warrant clause. Exigent circumstances justifying the use of that exception are apparent when consideration is given to the ease with which the notebook could be destroyed. And the search and seizure here was certainly not

of the variety which "violate the dictates of reason because of their number or their manner of perpetration," a question reserved in United States v. Edwards, 415 U.S. at 808, n.9. Trial court's refusal to suppress the notebook was correct.

II. Defendant's second contention is that tape recordings of conversations between a special agent and Roger Hertema should not have been admitted because a gap was left in the chain of custody. The supreme court has recently considered a closely related, but different, question on the foundation for tape recordings in State v. Russell, 261 N.W.2d 490 (Iowa 1978). Among the reasons recited for allowing admission of the tape in Russell was that the chain of custody had been established. 261 N.W.2d at 496. Russell, however, exemplifies a refusal to require technical or ironclad foundation requirements for such recordings. Instead, the emphasis appears to be on whether the offered recording is what is purports to be: an accurate reproduction of the conversations in question. This attitude is illustrated by Russell's approving quotation of United States v. Biggins, 551 F.2d 64, 67 (5th Cir. 1977), 261 N.W.2d at 495-96:

> If there is independent evidence of the accuracy of the tape recordings admitted at trial, we shall be extremely reluctant to distrub the trial court's decision...

And, in State v. Anderson, 159 N.W.2d 809, 815 (Iowa 1968), the supreme court vested

trial courts with "broad discretion to determine the admissibility of the evidence as relevant and trustworthy..." See also State v. Singleton, 311 So.2d 881, 884 (La. 1975).

In the present case, special agent Roger Downs testified without equivocation that the tape introduced as State's exhibit 3 accurately reproduced the conversation between himself and Roger Hertema. The fact that the trial occurred approximately ten months after the conversations were recorded is, of course, entitled to some consideration. It is not sufficient, however, to support a finding that trial court abused its discretion in admitting these tapes. See also State v. Bakker, 262 N.W.2d 538, 542-43 (Iowa 1978).

III. Defendant next complains that trial court should not have allowed State's exhibits 24A through 24D, a chart which showed the temporal relationships between telephone calls among various parties and other events involved in the crimes. The bases for his complaint are that the exhibits violated the best evidence rule, that Roger Downs, the sponsoring witness, was not competent, and that the exhibits were prejudicial.

The best evidence rule had no application to this situation. The State was not attempting to prove the content of a writing. It was, instead, attempting to summarize information which was, in part, recorded in the telephone toll call records which were admitted pursuant to stipulation as plaintiff's exhibit 23. See Schiltz v. Cullen-Schiltz & Assoc., Inc., 228 N.W.2d 10, 19-20 (Iowa 1975) (The best evidence rule "has no

application where the fact to be proven is independent of any writing even though the fact has been reduced to a writing or is evidenced by a writing."); see also U.S. Homes, Inc., v. Yates, 174 N.W.2d 402, 404 (Iowa 1970).

Whatever doubt which might remain on the subject is removed when consideration is given to the availability of State's exhibit 23. The possibilities of inaccuracies or fraud are thus minimized. Cf. U.S. Homes, Inc., v. Yates, 174 N.W.2d at 404 ("The underlying purpose of the best evidence rule is the prevention of fraud."); see generally E. Cleary, McCormick on Evidence § 231 (2d Ed. 1972).

Nor is defendant's challenge to Downs' competency well-founded. A witness, in order to be competent, must meet three criteria; (1) he must have knowledge of the facts about which he testifies; (2) he must have a recollection of those facts; and (3) he must be able to communicate his recollections to the court. State v. Harvey, 242 N.W.2d 330, 335 (Iowa 1976). The record demonstrates that Downs was familiar with the toll call records from which the chart was made, and that he had no difficulty in recalling and communicating those facts.

Finally, the admission of State's exhibit 23 and the opportunity for cross-examining Downs on exhibits 24A through 24D render the risk of that exhibit being prejudicially misleading highly remote. State's exhibits 24A through 24D were properly admitted. See generally McCormick, supra at § 213.

IV. Defendant moved for a direct verdict, claiming that the testimony of his co-conspirator was uncorroborated. He assigns trial court's refusal to grant the directed verdict as error.

The standards by which the adequacy of corroborative testimony is judged were reviewed in State v. Vesey, 241 N.W.2d 888, 890 (Iowa 1976). The State, in its brief, has accurately summarized important portions of the co-conspirator's testimony and has quite helpfully referred us to portions of the record which support material parts of the testimony of the co-conspirator, Roger Hertema. (Appellee's brief 18-23). The facts on which Hertema was corroborated tended to connect defendant with the commission of the crime. This assignment is without merit.

V. The fifth division of defendant's brief is addressed to the propositions that defendant was subjected to double punishment and that the evidence was insufficient to support his conviction.

The sentences imposed upon the conspiracy count and the first substantive larceny count are not double punishment. Neither offense is included within the other. A conspiracy trial does not bar prosecution for the substantive offense. State v. Reynolds, 250 N.W.2d 434, 439 (Iowa 1977), citing State v. Thompson, 241 Iowa 16, 21, 39 N.W.2d 637, 640 (1949). Those rules resolve the related double punishment issue arising from counts I and II of the information.

However, defendant has been subjected to double punishment by being sentenced on both count II and count III. Those two counts charge him with larceny for the theft of two tractors from the same person at the same time and place. The State has confessed error on this point, but suggests that the error has been waived because it was not raised until after presentation of the State's case in chief. State v. Birkestrand, 239 N.W.2d 353, 363 (Iowa 1976) does indeed contain language suggesting a waiver of double punishment is possible. Nonetheless, the supreme court in State v. Gilroy, 199 N.W.2d 63, 68 (Iowa 1972) raised the issue sua sponte to resolve it in defendant's favor. While Gilroy probably does not compel similar treatment here, the nature of the error and of the remedy suggest that following the Gilroy course is the better alternative. Therefore, the judgment entered upon count III will be annulled and set aside.

In reviewing defendant's challenge directed to the sufficiency of the evidence to support his conviction, we are guided by State v. Overstreet, 243 N.W.2d 880, 883-84 (Iowa 1976). The conviction is adequately support by the evidence.

VI. Finally, defendant argues that it was error to allow the State to inquire into the nature of one of his prior felony convictions. Defendant had been convicted of conspiracy to embezzle or misapply bank funds and embezzlement or misapplication of bank funds. Trial court, in response to a motion in limine, permitted the State to solicit

from defendant the number of prior convictions, but allowed inquiry into the nature of the second conviction alone. The court precluded inquiry into the nature of the conspiracy charge due to its similarity with the present count I. Defendant inconsistently complains in his brief both that "[i]t is almost impossible to gauge the speculation of the jury on the unexplained conviction," and that "[d]etails serve only to increase the prejudice the record creates..." We are not persuaded that error occurred; the rule of State v. Martin, 217 N.W.2d 536, 542 (Iowa 1974) was properly applied.

All assignments have been considered. With the exception noted in division V, all are without merit.